or participation of the husband. *McClure v. McMartin,* 104 La., 496. The same doctrine is established in Kansas. See *Norris v. Corkill,* 32 Kans., 409.

To remove all possibility of doubt, to prevent continuous dissension among the judges of the respective courts, and to determine once for all the law that should govern in the particular jurisdiction, it has been found expedient to enact statutes in many States relieving the husband by express language from liability for the wife's torts. Alabama, Massachusetts, Indiana, and Michigan are among the States which have enacted express statutes upon the subject.

Upon a careful examination of the authorities there can be no doubt that the decided weight of authority is in support of the common law rule making the husband liable for the torts of the wife irrespective of the statute giving the wife absolute control of her property. Where there is no express statute upon the subject comparatively few States exonerate the husband from liability by reading into the Married Woman's Act, contrary to the wording of the statute, language sufficient for that purpose.

THE EFFECT UPON A PRIOR WILL OF THE REVOCATION OF A SECOND WILL CONTAINING A REVOKING CLAUSE.

The authorities are in irreconcilable conflict as to the effect of the destruction of a second will containing a revoking clause upon a prior will, in the absence of any statutes.

In the recent case of *Blackett v. Ziegler,* 133 N. W. (Iowa), 901, the testatrix executed a will in 1895. She subsequently made another will which contained a clause revoking the will of 1895. The later will was destroyed by the testatrix. The Court held that the destruction of a second will which expressly revoked a former will does not raise any presumption that the former will is thereby revived, but it is a question of the testator's intent, to be gathered from admissible parol testimony.

This case follows the rule of the ecclesiastical courts of England, which is stated in the case of *Helyar v. Helyar,* 1 Lee Ecc., 472. This rule is that the revival of a former uncancelled

will by the destruction of a subsequent revocatory will was purely a matter of the testator's intention.

This rule was never followed by the common law courts of England, but it has been instrumental in molding the decisions rendered by a number of jurisdictions in this country, the leading case being *Pickens v. Davis,* 134 Mass., 252. The Court there held that in the absence of any statutory provisions to the contrary the proof of such an intention at the time of the cancellation of the second will would give to the act of cancellation the effect of reviving the former will.

Under this rule there is no presumption either way, but it is to be determined solely according to facts and circumstances. *Horton v. Head,* 3 Phillim. Ecc., 26.

Some of the American decisions which have adopted the ecclesiastical rule have digressed somewhat from the doctrine stated in *Horton v. Head, supra.* The Court says in *Pickens v. Davis, supra*: "It is more natural and reasonable to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions and substituted therefore a new disposition of his property." Therefore it is held that in the absence of evidence as to the testator's intention the prior will will not be revived. *Williams v. Miles,* 94 Nev., 591.

The doctrine of the ecclesiastical courts is based on the assumption of actual destruction, for, as is stated in *Daniel v. Nockalds,* 3 Hagg. Ecc., 777, an effort to revive a revoked will by oral declarations without destroying the later will would be ineffectual.

The reason given by some of the American courts for adopting this doctrine in preference to the common law rule, *infra,* is that the ecclesiastical courts had jurisdiction over wills disposing of personalty, and from their decisions our law is derived in large part. At the same time they say this rule is the most reasonable that can be formulated. *Williams v. Miles,* 94 Nev., 591.

The common law rule was that the cancellation or destruction of the second will *ipso facto* revives the former will, irrespective of the intention of the testator. This rule was based on the

statement of Lord Mansfield in *Goodright, Glazier v. Glazier*, 4 Burr, 2512, which held that the destruction of the second will containing a revocatory clause will cause the first will to operate as if the second will had never been executed. The last will existing is given effect as the "last will." The revoking clause is treated as purely testamentary in its character.

The theory upon which this rule is based has been stated to be that "all wills are ambulatory and have no operation until the testator's death, and the destruction *animo revocandi* by the testator of a second will will necessarily leave the first to go into operation at his death, nor does the fact that the second contains a clause of revocation alter the case, because that clause is just as inactive as the rest of the will and so continues up to the time the whole will is cancelled." *Stetson v. Stetson,* 200 Ill., 594.

The rule laid down by Lord Mansfield is no longer of any force in England. It has been abrogated by the *Statute of Wills,* 1 Vict., c. 26, s. 22, which provided that no will or codicil or any part thereof which shall be in any manner revoked, shall be revived other wise than by the re-execution thereof, or by a codicil executed as required by the act, and showing an intention to revive the same. The old English rule prior to the statute has still some force, however, in this country, as is shown by the case of *Stetson v. Stetson, supra.*

In addition to the rules stated, there is another line of cases which hold that the revocatory clause is not testamentary in its character, but that it operates to revoke the prior will immediately upon the execution of the second will.

The Court in *In re Noon's Will,* 115 Wis., 299, states: "Where the second will contains a revoking clause, all former wills are wiped out and held for naught. The operation of the revocatory clause is immediate and absolute. It is an act done solemnly and deliberately for present effect, and not one contemplating that future circumstances are to determine whether it shall have force."

A deed of revocation separate from the will operates instantaneously, and the operation is the same, whether the revoking

clause be in a deed or will, for it is never a necessary part of the latter. *James v. Marvin,* 3 Conn., 576.

This doctrine has been criticised by some of the text writers. 1 *Redfield on Wills,* Sec. 328: "This doctrine has an air of plausibility from the fact that an instrument of revocation alone would unquestionably have this effect so long as it was allowed to remain operative. But that would show a present purpose of becoming intestate carried into effect as far as practicable before death. But the making of a will with a revocatory clause is very different. It is but substituting one will for another, and the revocatory clause is made dependent in some sense upon the subsequent will going into operation, and there is ordinarily no purpose of having the revocatory clause operate except upon that condition."

Much of the uncertainty existing in these cases has been removed by legislation in a number of the States, some following the English statute, *supra.* In those States, however, which have no express statute regulating this matter, the greater number follow the doctrine of the principal case, which is substantially the old ecclesiastical rule, that the question as to whether or not the earlier will is revived by the cancellation of the later will depends upon the intention of the testator, and that in the absence of affirmative evidence of such intent there will be no revival. The common law doctrine as stated by Lord Mansfield is in the main disapproved in this country, according to *Schouler on Wills,* Sec. 415.

REFRESHING MEMORY BY REFERENCE TO COPY OF REPORT PRINTED IN A NEWSPAPER.

At times a witness is unable to recall facts clearly, at the time when he is being examined. The question as what may be used to refresh his memory then becomes important. That he may use a memorandum made by himself at the time, provided it calls up an independent recollection in his mind, is fully settled. But many cases arise where although the witness made a memorandum at the time, the original has since been lost, or is unavailable, and only a copy can be produced.

Erdman v. State, 134 N. W. (Neb.), 258, presents such circumstances as those mentioned. The defendant was being tried for